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Congress of the United States
House of Representatives
Washington, DC 20515

ZOE LOFGREN
19TH DISTRICT, CALIFORNIA

October 8, 2014

The Honorable Tom Wheeler
Chair, Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Dear Chairman Wheeler:

The record breaking 3.7 million comments on net neutrality received by the FCC should leave no doubt as to where the public interest lies on this issue. Large technology companies, small app developers, movie and television writers, public advocacy organizations, and the public at large have all made it clear that blocking, throttling, or prioritizing Internet traffic based on source, application, or content is unacceptable, and harms innovation and self-expression.

In a previous letter, sent prior to the rulemaking, I expressed my belief that reclassification was the FCC's only path for implementing strong and unambiguous net neutrality protections. After reading many of the comments submitted to the FCC, I continue to be unconvinced that the rules needed to ensure an open and prosperous Internet can be accomplished under the FCC's 706 authority alone, as initially proposed.

It is true that reclassifying all broadband Internet access services as title II services is not without some concern, which is why it should be done as narrowly—with as much restraint as possible—and solely to accomplish the goals of net neutrality. With a House of Representatives that has completely removed itself from the conversation by refusing to even entertain the idea that ensuring an open and free Internet is in the best interest of all parties, this appears to be the only option the FCC has moving forward.

The market has evolved significantly since the FCC first classified cable broadband Internet access as an information service in 2002. According to Pew Research studies, since 2002 broadband adoption in the U.S. has increased from 11% to 70%. Social media use, which was only used by 8% of American Internet subscribers in 2005, has skyrocketed to 74%; and perhaps most transformative of all, 50% of the public now relies on the Internet as a main source of news. This is even more pronounced in users between the ages of 18 and 29 with 71% relying on

the Internet as a main source for news. Even for those between the ages of 30 and 49, 63% rely on the Internet as a main source of their news, the same number that rely on television.

Americans are increasingly relying on the Internet as a conduit for business, social interactions, speech, and information, but this reliance also increasingly gives the small group of broadband providing companies control over every aspect of our society unparalleled in the history of technology, which only makes the need to ensure the continuation of the Internet's current openness more immediate.

In addition to the societal changes, technological changes should also be taken into account while considering the reclassification of broadband Internet access. In 2002, low speed connections, simpler and lighter-weight websites, and the processing limitations of routers all made the precise shaping of Internet traffic required to block, throttle, or prioritize traffic technologically impossible and fiscally unappealing. Now that both the technological capability and the business incentives exist, the FCC has ample reason to reconsider its previous decisions.

Of the proposals put forward, there is only one that currently meets the criteria of clear, unambiguous authority, strong rules, and measured restraint that has been demanded by the public. That is for the FCC to reclassify broadband Internet access as a title II service, and use a combination of its rulemaking and forbearance authority under section 706 to implement its Open Internet rules.

I am aware that some have expressed concern that once broadband is reclassified as a title II service, forbearance from the majority of title II's rules could be considered arbitrary or capricious, requiring the FCC to then apply the whole of, or at least a majority of, title II rules to broadband.

However, through section 706 of the Telecommunications Act, Congress gave the FCC "significant... authority and discretion to settle on the best regulatory or deregulatory approach to broadband." And while the court in *Comcast* held that the FCC's current precedents prohibited it from using section 706 alone to establish net neutrality regulation, it also reaffirmed its previous decision that section 706 empowers the FCC to "[choose] between regulatory approaches clearly within its statutory authority under other sections of the Act," granting the FCC greater latitude when determining forbearance for broadband than for other services. In other words, it is clear that – at the very least – section 706 gives the FCC more flexibility in determining whether forbearance is proper than section 10 does for other telecommunications services.

However, in an apparent overruling of the FCC's precedents, the court in *Verizon* recently held that section 706 did in-fact provide affirmative authority to promulgate rules encouraging broadband availability, although it did not allow the FCC to treat broadband as a de facto common carrier without first classifying it as such. Whether or not section706 does in and of itself provide affirmative rulemaking authority, it still provides sufficient authority for the FCC to create strong Open Internet requirements.

I also urge the FCC to carefully evaluate proposals that advocate recognizing a new title II service independent from the telecommunications infrastructure used for its transmission. Such a

split does have precedence – for example, the splitting of cable television from broadband which largely use the same infrastructure – and I applaud these proposals for their well-measured restraint. If the FCC determines that one of these proposals is the best path forward it must ensure that the resulting rules are clearly defined and based on solid regulatory authority.

Finally, as the FCC did in its original Open Internet Order, it should once again consider exceptions for reasonable network management that take into account the differences in infrastructure, capacity, and technology of a given broadband service. I am doubtful that a one-size fits all solution can be crafted that effectively covers all the different implementations of broadband service, and as such, urge the FCC to consider the unique limitations of each type of broadband service when crafting prohibitions, presumptions, and regulatory processes.

Sincerely,

Zoe Lofgren
Member of Congress